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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 THE NEW YORK TIMES COMPANY,
4 CHARLIE SAVAGE,

Plaintiffs,

v.

11 CV 6990 (WHP)

6 UNITED STATES DEPARTMENT OF
7 JUSTICE,

8 Defendant.

9 -----x
10 AMERICAN CIVIL LIBERTIES
11 UNION, ET AL.,

Plaintiffs,

v.

11 CV 7562 (WHP)

13 FEDERAL BUREAU OF
14 INVESTIGATION, ET AL.,

15 Defendants.

16 -----x

New York, N.Y.
May 4, 2012
10:35 a.m.

18 Before:

19 HON. WILLIAM H. PAULEY III,

20 District Judge
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APPEARANCES

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AMERICAN CIVIL LIBERTIES UNION, WOMEN'S RIGHTS PROJECT
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(In open court)

THE DEPUTY CLERK: This is the case of The New York Times Company et al. against United States Department of Justice and the American Civil Liberties Union et al. against the Federal Bureau of Investigation et al.

Appearances for the plaintiffs?

MR. McCRAW: Good morning, your Honor. David McCraw, assistant general counsel for the New York Times Company. I'm here with my colleague Nabiha Syed.

THE COURT: Good morning, Mr. McCraw.

MR. HADDAD: Good morning, your Honor. Richard Haddad of Proskauer Rose for Plaintiff ACLU.

THE COURT: Good morning, Mr. Haddad.

MR. ABDO: Good morning, your Honor. Alex Abdo of the ACLU.

THE DEPUTY CLERK: Appearances for the defendant?

MS. DAUGHTRY: Good morning, your Honor. Assistant United States Attorney Emily Daughtry for the government.

THE COURT: Good morning, Ms. Daughtry.

MR. CLOPPER: John Clopper from the government.

THE COURT: Good morning, Mr. Clopper.

There are motions and cross-motions. Who wishes to be heard? Don't all jump up at once.

MR. McCRAW: My understanding, from our conversations, is the government will begin, your Honor.

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1 THE COURT: Very well, Mr. McCraw.

2 MS. DAUGHTRY: Good morning, your Honor. My name is
3 Emily Daughtry. I'm an Assistant United States Attorney for
4 the Southern District of New York, here this morning on behalf
5 of the government.

6 Your Honor, there are two central issues before this
7 Court this morning. The first is whether the government
8 properly withheld the single document that's at issue in these
9 motions, a classified report describing intelligence collection
10 activities pursuant to FOIA exemption 1, which allows the
11 government to withhold classified information from disclosure.
12 And the second issue is whether the government properly
13 withheld this same single document, pursuant to exemption 3,
14 which allows the government to withhold documents pursuant to a
15 particular statute, in this case the National Security Act,
16 which allows protection of intelligence sources and methods.

17 As the government has explained in its public
18 declarations, the particular report at issue describes an
19 intelligence collection operation. The government has also
20 explained that the document is properly classified and the
21 government has explained that the release of this document
22 would harm national security because it would provide the
23 United States adversaries with the means to degrade or evade
24 the intelligence-collection activities that are described in
25 the document itself.

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1 THE COURT: Why did the Office of Information Policy
2 inform The New York Times that it would refer the report to the
3 DOJ review committee to determine whether the document should
4 remain classified?

5 MS. DAUGHTRY: Your Honor, that was in the context of
6 a letter regarding the New York Times administrative appeal of
7 the document, and that is standard procedure for the Office of
8 Information Policy in any administrative appeal of a classified
9 document. But once the case was in litigation, all
10 administrative appeals are dropped, and the government's
11 current position is that the document is currently properly
12 classified.

13 THE COURT: So the reference of the report is just
14 reflexive? The government does it every time they receive a
15 request?

16 MS. DAUGHTRY: My understanding is that as a matter of
17 policy, in and administrative appeal involving a document that
18 has been withheld as classified, they will automatically do
19 this, yes, as a matter of routine.

20 THE COURT: Is that standard policy memorialized
21 anywhere?

22 MS. DAUGHTRY: I don't know the answer to that, your
23 Honor.

24 THE COURT: All right. If it is, I would invite a
25 letter submission concerning it, because I don't see anything

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1 in the record about it, and it left me wondering.

2 MS. DAUGHTRY: I'd be happy to do that.

3 Your Honor, the plaintiffs have made a lot of
4 arguments as to why the government should not withhold this
5 document -- and of course I'm happy to answer any questions the
6 Court has with respect to their arguments -- but the bottom
7 line is that none of them undercut the fact that the
8 government's explanations in its public declarations alone, as
9 well as in its classified submission, are both logical and
10 plausible, which is the standard that has been articulated by
11 the Second Circuit in Wilner. And the government's
12 declarations are entitled to deference given the national
13 security issues at issue in this particular case, and also too
14 the presumption of good faith that all of the government's
15 declarations are generally accorded in a FOIA case.

16 THE COURT: Well, do the comments by Senators Wyden
17 and Udall create any specter of bad faith?

18 MS. DAUGHTRY: They don't, your Honor, they don't.
19 The issue that's relevant for bad faith is whether the
20 government's declarations in invoking the FOIA exemptions were
21 made in bad faith. And statements by the senators providing
22 views as to whether the government's interpretation of Section
23 215 is at odds with the public's understanding of this statute,
24 are simply not relevant to the issue of whether the government
25 acted in bad faith in asserting in its declarations that the

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1 report was classified.

2 And nothing in the record suggests, let alone provides
3 the tangible evidence that's required under the case law, that
4 the government's declarations regarding the invocation of
5 exemptions 1 and 3 were made in bad faith. And certainly
6 there's no suggestion that the government classified the
7 information in the report for the purpose of concealing any
8 type of illegal activity, which is the standard which is
9 required in Wilner.

10 Furthermore, I would just like to point out that even
11 if the senators had stated directly that it was their belief
12 that this report had been improperly withheld and was not
13 properly classified, even if the senators had submitted a
14 declaration in this action to your Honor, that would not be
15 sufficient to undermine the deference that is due to the
16 executive branch declarations on matters of national security.

17 THE COURT: How can the public effectively participate
18 in the political process if the government's interpretation of
19 federal law is kept secret?

20 MS. DAUGHTRY: Well, I guess as an initial matter,
21 your Honor, I would want to point out that the document that's
22 at issue in this particular case is a description of a
23 particular intelligence-collection operation. As we said in
24 the supplemental Bradley declaration that we submitted with our
25 opposition and reply brief, it does not contain any abstract

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1 legal analysis or interpretation of the law, as appears to be
2 envisioned by the plaintiffs, some sort of interpretation that
3 is devoid of factual content. So what we have here is a
4 particular document that describes a particular intelligence
5 collection operation.

6 To the extent that you're asking hypothetically how
7 can the public participate in a debate if an interpretation of
8 a law is kept secret, if you had a document that had an
9 interpretation of the law that was kept secret, here the public
10 participates by electing members of Congress who provide
11 oversight to the operations that are conducted here. This
12 particular statute authorizes operations that are authorized by
13 an Article III Court and are fully reported to Congress through
14 the congressional intelligence committees, to the people's
15 representatives.

16 THE COURT: Anything further, Ms. Daughtry?

17 MS. DAUGHTRY: I don't think so, your Honor. I'm
18 happy to clarify anything additional that comes up.

19 THE COURT: All right.

20 Let me hear from the plaintiffs.

21 MR. McCRAW: Thank you, your Honor. I think that your
22 Honor's question provides the appropriate backdrop here, that
23 Senator Wyden said it's awfully hard to have thoughtful debate
24 if in fact you cannot figure out how the executive branch is
25 interpreting the law. And that's why we are here: Members of

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1 Congress have said that there is a gap between what the statute
2 appears to say, how the Justice Department communicates what it
3 says, and how they actually act upon it.

4 We believe that this is one of those cases where
5 in camera review is required. I say that for three reasons:

6 First, the government has failed to clearly state
7 whether there is legal analysis here. That, to me, is a
8 serious omission, because we have made clear from the
9 beginning, that's what this case is about. We, in our
10 complaint, said that there was legal analysis. They responded,
11 they could neither confirm nor deny that.

12 In the briefing here, they have never said that there
13 is legal analysis. They have always said there is no legal
14 analysis that's segregable. That combines two things. Is
15 there legal analysis that's segregable? And so the first
16 reason I would say in camera review is important here is to
17 just get to that question, which should have been part of their
18 public declarations but isn't: Is there legal analysis,
19 interpretation of this statute, which shows the scope and the
20 limits the government believes that the statute grants to it?

21 Second, the government's public declarations have
22 failed to show that under the standard that the government
23 articulated, that it is logical and plausible that legal
24 analysis should be classified. They have said national
25 security operations, information about national security

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1 operations, should be classified. They have never made that
2 case on legal analysis. Where is the plausible connection that
3 legal analysis can be withheld under exemption 1 because it
4 would reveal something that's properly classified, or under
5 exemption 3, through the National Security Act?

6 It's not enough for them to simply say this involves a
7 classified intelligence-gathering operation and classified
8 operations are kept secret, exempt from FOIA, therefore, this
9 memo should be. They haven't said what else is in this memo.
10 We do not dispute their right, the government's right, to
11 withhold information about operations, but they have not made
12 that connection for legal analysis.

13 When I read Wilner and the Second Circuit talks about
14 logical and plausible, I think they're talking more about a
15 philosophy 101 example of classified information should be kept
16 secret, this has some classified information therefore it
17 should be kept secret. What they're looking for is public
18 declarations in Wilner, public declarations that say, without
19 disclosing secrets, here's what's in the document and here is
20 why it can't be released. They have not met that standard.

21 The third point I would make here goes to their
22 arguments about segregability. And, again, the standard is
23 logical and plausible. Again, they have provided public
24 declarations that never explain why. What is the structure of
25 this document? How is it organized? What about it makes it so

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1 that the legal analysis can't be segregated? That's the burden
2 they have here.

3 I would direct your Honor, in reviewing these
4 affidavits, to two things, or their declarations to two things.
5 At the end of the Halpern case from the Second Circuit, the
6 Court actually reproduces part of the declaration there. It's
7 an appendix at the end of Halpern. The Second Circuit says
8 that declaration is insufficient because it simply states
9 conclusory conclusions about why something should be secret.
10 It merely states what the standard is and says this declaration
11 meets the standard. The Second Circuit said that's not enough,
12 that the reason FOIA was structured to allow de novo review, to
13 allow in camera review, was that we don't simply have to trust
14 the government about these decisions. That's the first thing I
15 would point your Honor to.

16 The second thing I would point your Honor to is the
17 recent case that was decided by Judge Sullivan, which is an
18 ACLU case, where he found the declarant here, Mr. Bradley, to
19 have submitted a declaration that was insufficient. In fact,
20 he went so far as to say that the government seems to think
21 that review of the declarations is nothing more than a judicial
22 spellcheck, they have to do more than state what the policy is,
23 they have to do more than state what the standards are. We
24 pulled that declaration, we looked at it. It's actually more
25 detailed than the one here. It's nine pages, it has more

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1 detail, and even then was found insufficient.

2 I think under those standards -- and we cite others in
3 our brief -- the declarations here have failed to carry the
4 government's burden; and the appropriate remedy for that is
5 in camera review. It's five pages. It's not the kind of case
6 where we're asking the Court to look at hundreds of pages of
7 documents. We think that it's not a case where deference,
8 which the government has spoken to, is due; because if you look
9 at how that deference principle is applied in these cases, it's
10 really deference to the government's determination that
11 national security would be harmed. It's not deference to
12 something like what's legal analysis, it's not deference to can
13 it be segregated. We think the courts have equal or greater
14 competence in doing that. And it's especially necessary here
15 where the government says we're not even sure what legal
16 analysis is.

17 So we believe that in light of the public record here,
18 in light of the serious issues raised, that the government may
19 be misleading the public, that in camera review is the next
20 appropriate step.

21 THE COURT: If in camera review revealed that the
22 document was properly withheld, does it matter if the public
23 declaration from the government is conclusory?

24 MR. McCRAW: I think your Honor's in camera review
25 carries the day in the decision. We obviously have the right

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1 to appeal, but ultimately the in camera review carries the day.

2 THE COURT: Aside from the public statements by
3 Senators Wyden and Udall, do you have any other evidence of bad
4 faith on the part of the government?

5 MR. McCRAW: No, we don't, your Honor. And I would
6 speak to the bad-faith point for just a second, which is: We
7 look at their statements as suggesting that the government is
8 willfully telling the public one thing and doing something
9 else. But even if that were not so, even if there's no
10 evidence of bad faith, even if there's no evidence of any
11 misconduct, the underlying principle that the public should
12 know how the government is interpreting the law would remain in
13 place. Whatever the reason it's not being disclosed, the
14 public should know so there can be that kind of informed debate
15 Senator Wyden talks about.

16 THE COURT: All right.

17 MR. McCRAW: Thank you, your Honor.

18 THE COURT: Thank you, Mr. McCraw.

19 Mr. Haddad, do you wish to be heard?

20 MR. HADDAD: Yes, your Honor.

21 Your Honor, a motion for partial summary judgment
22 presents a simple but important question: Can the government
23 continue to conceal from the public its legal interpretation of
24 Section 215 of the PATRIOT Act, the public law that governs and
25 constrains the government's interaction with, and its ability

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1 to conduct surveillance on, American citizens.

2 As Mr. McCraw said, two United States senators have
3 repeatedly warned that Section 215, which is a public law that
4 affects the rights of American citizens, has been the subject
5 of secret legal interpretation.

6 We believe the five-page memorandum at issue here
7 would shed light upon the government's interpretation of the
8 scope of its surveillance authorities under Section 215.

9 The government significantly, as Mr. McCraw pointed
10 out, has not denied that the memorandum contains legal
11 analysis. In short, your Honor, we want to know what falls
12 within the phrase "any tangible things." We want to know how
13 the government defines the threshold of necessary relevance
14 within the meaning of Section 215.

15 The nature of this statute makes it unlikely the
16 targets of this type of surveillance will ever learn of, or
17 have the opportunity to challenge, the provision of their
18 information to the government. This magnifies the importance
19 of this issue in this case. In view of that unlikelihood, as
20 well as the senators' statements, the government's refusal to
21 deny that the document contains legal analysis, and the fact
22 this is only a five-page document, your Honor should at the
23 very least conduct a careful in camera review to ensure that
24 all information relating to the government's legal
25 interpretation of Section 215 is released.

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1 Now, I just want to emphasize that we aren't asking
2 for the disclosure of ongoing intelligence operations or
3 sources or methods or specific investigations. We merely seek
4 information relating solely to the government's legal
5 interpretation of the provision, including all portions of the
6 memorandum that describe or convey the government's
7 understanding of the scope of its surveillance authority and
8 the types of information that may be collected pursuant to that
9 authority.

10 We want to know, in short, how broad is the universe
11 of tangible things that the government believes it may collect
12 under this law and how does the government define the threshold
13 of relevance necessary to subject a target to this type of
14 surveillance? For example, the memorandum may very well
15 reflect that the government believes that it may use Section
16 215 to collect location information regarding the movements of
17 American citizens; it may reflect the fact that the government
18 believes it may collect DNA information from American citizens.
19 We have no idea at this point whether the government views this
20 type of information as tangible things within the meaning of
21 215.

22 And that information, your Honor, is not classifiable.
23 That's why the information that we request comprises the type
24 of secret law the withholding of which FOIA does not allow. It
25 is secret law because it guides and constrains the government's

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1 surveillance authority, and it does have a real, lasting effect
2 on the privacy rights of American citizens.

3 We do not dispute --

4 THE COURT: Let me ask you this, Mr. Haddad: On this
5 question of secret law, has any court ever mentioned secret law
6 in the context of exemptions 1 or 3?

7 MR. HADDAD: Your Honor, since we filed this brief, it
8 has come to our attention that a court in this district,
9 actually Judge Jones, recently addressed the secret-law
10 argument in a FOIA case where the government classified the
11 document at issue under exemption 1. While Judge Jones
12 ultimately upheld the government's invocation of exemption 1,
13 she did not find or imply that the secret-law doctrine is not
14 applicable in that context.

15 THE COURT: Well, is there any case that you're aware
16 of in which a court ordered the disclosure of sensitive
17 national security information because it constituted secret
18 law?

19 MR. HADDAD: There is not, your Honor. But as we said
20 in our brief, and as the government failed to say in its brief,
21 nor are we aware of any case where the court said that a
22 secret-law analysis is inapplicable in that type of case.

23 THE COURT: Secret law is not mentioned anywhere
24 within the FOIA exemptions, is it?

25 MR. HADDAD: No, it's not, your Honor.

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1 THE COURT: Is it your view that secret law would
2 trump a FOIA exemption?

3 MR. HADDAD: Under certain circumstances, your Honor,
4 that is our view, in view of the underlying purposes behind
5 FOIA, which courts have interpreted as having been passed to
6 eliminate secret law and to inform the public of how the
7 government is operating and why.

8 THE COURT: Could you describe for me a situation in
9 which, in your view, secret law would trump such an exemption?

10 MR. HADDAD: Well, I believe this case, your Honor,
11 presents such a situation. If this memorandum includes
12 portions or sentences that state, for instance, that the
13 government believes it may collect location information
14 regarding the movements of targets pursuant to 215, that would
15 constitute secret law because that is information that reflects
16 the ways in which the government uses its authority and
17 interprets its authority under a public law. And that type of
18 interpretation is not publicly known. It's not something that
19 anybody's aware of. And it goes far from the plain meaning of
20 the statute.

21 THE COURT: All right. Anything further, Mr. Haddad?

22 MR. HADDAD: No, your Honor. Thank you.

23 THE COURT: Thank you.

24 Ms. Daughtry, do you wish to be heard very briefly?

25 MS. DAUGHTRY: I do, your Honor.

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1 Thank you, your Honor. There are a number of points
2 that I would like to address that both Mr. McCraw and
3 Mr. Haddad raised.

4 As an initial matter, both of them have asked the
5 question "does the report contain any legal analysis?" and have
6 suggested that the government has not been clear on this point.
7 I think the government has been very clear. The report does
8 not contain the type of legal analysis that seems to be
9 envisioned by plaintiffs; that is, legal analysis that is
10 utterly divorced from any factual content.

11 The government has repeatedly said in its declarations
12 that this report describes an intelligence-collection
13 operation. As we set forth in the supplemental Bradley
14 declaration, the report does refer to the statute, Section 215,
15 that authorizes the intelligence-collection operations
16 described in the report. And obviously, because the operation
17 is being conducted pursuant to a particular statute, there is
18 an implicit analysis or interpretation of the statute that is
19 inherent in the description of the operation.

20 So, to the extent that you want to consider that legal
21 analysis as set forth in the supplemental Bradley declaration,
22 then that analysis is inextricably intertwined with, and not
23 segregable from, the description of the classified intelligence
24 operation.

25 But I think it's also important to point out that it

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1 is the government's position that the distinction between legal
2 analysis and fact is simply not relevant for the purposes of
3 exemption 1. The only thing that is relevant is whether the
4 information in the report, be it analysis or fact, is properly
5 classified pursuant to the standards set forth in the executive
6 order on classification, Executive Order 13526, and whether an
7 original classifying authority can articulate the harm to
8 national security that would result from the disclosure of that
9 information, and then whether the Court finds that the
10 government's explanation of harm, as set forth in the
11 declaration, is logical and plausible.

12 I would posit that it is certainly logical and
13 plausible that the disclosure of an intelligence-collection
14 operation would allow the United States adversaries to
15 undermine, degrade or evade the intelligence-collection
16 capabilities that are described in the report.

17 With respect to Mr. McCraw's point that the
18 explanations are not logical and plausible, and that the
19 declarations are conclusory, I would point specifically to
20 paragraph 9 of the first unclassified Bradley declaration. And
21 unlike the appendix in the Halpern case, which Mr. McCraw
22 pointed out, it does not simply restate the standards in the
23 executive order, but if you look at that paragraph, it
24 specifically says that the withheld material contains specific
25 descriptions of the manner and means by which the United States

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1 government acquires tangible things for certain authorized
2 investigations, pursuant to Section 215.

3 And in that same paragraph, Mr. Bradley goes on to
4 say: "Disclosure of these specific descriptions of the manner
5 and means by which the United States acquires these things
6 would provide our adversaries and foreign intelligence targets
7 with insights into the United States government's foreign
8 intelligence-collection capabilities, which, in turn, could be
9 used to develop the means to degrade and evade these collection
10 capabilities."

11 So certainly it is logical and plausible that
12 disclosure of intelligence-collection capabilities can lead to
13 evasion of those intelligence-collection capabilities. And, I
14 would posit, simply because the logic is simple does not make
15 it conclusory.

16 With respect to the issues raised by Mr. Haddad, I
17 just want to point out that in the Judge Jones opinion, Judge
18 Jones finds that the document that was at issue is in fact not
19 secret law, and she has no discussion one way or the other as
20 to whether secret law is applicable in this particular context.
21 So I think it sheds very little light on this issue.

22 It is, I think, important that Mr. Haddad explicitly
23 said that it is the position of plaintiffs that secret law
24 would trump a valid FOIA exemption. There is simply no basis
25 in law for that assertion. Congress has specifically set forth

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1 in the FOIA exemptions pursuant to which the government is
2 entitled to withhold information. And the Supreme Court has
3 specifically stated that all documents must be released under
4 FOIA unless they can be withheld pursuant to a particular FOIA
5 exemption. And there is nothing in any of the secret law -- in
6 any of the cases that discuss secret law or that use the phrase
7 "secret law," if you look at every single one of those cases,
8 if you look at every single case cited by the plaintiffs in
9 their brief, the analysis done by the court is, does a
10 particular exemption apply, does exemption 5 apply, does
11 exemption 2, which is no longer extant but does exemption High
12 2 apply in deciding whether to withhold a document.

13 And in their analysis of secret law, if a court finds
14 that, yes, something constitutes secret law, it is because it
15 doesn't fall within that exemption. So if it's within
16 exemption -- if it's under exemption 5, where it commonly comes
17 up -- for example, courts find that it's not withholdable as
18 secret law because it doesn't fit within the exemption because
19 it is no longer predecisional and is operating in fact as an
20 agency's working law.

21 THE COURT: All right, anything further?

22 MS. DAUGHTRY: That's it, your Honor.

23 THE COURT: Thank you, Ms. Daughtry.

24 MR. McCRAW: Your Honor, could I speak very briefly to
25 those points?

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1 THE COURT: Certainly, Counsel.

2 MR. McCRAW: I'd just like to make four points in
3 response.

4 One is, the government has mischaracterized what we
5 mean by legal analysis when they say we mean something that's
6 utterly devoid of facts. We have never said that. We define
7 legal analysis as scope and limit of the government's
8 authority, types of information, and meaning of relevance. To
9 some extent in any legal discussion, you're going to have
10 facts. The question is, does it disclose something that should
11 be classified and must be classified?

12 And that's the second point I would make.

13 The government seems to think that if a disclosure
14 might have some impact on national security, that's enough.
15 That's not enough. Senator Wyden made an important point. The
16 PATRIOT Act is public. There is no question that national
17 security would probably be enhanced if it were secret. That's
18 not how we work. There's a balance between transparency, where
19 people know what the law is, and things that need to be secret.
20 Secrecy doesn't trump everything, nor does national security.

21 Third, I simply again direct your Honor's attention to
22 the Halpern declaration. The very language that was read by
23 counsel, I think, is almost, if not, verbatim in exactly the
24 same spirit as the Halpern appendix.

25 Finally, I just want to address this question of

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1 whether secret law trumps exemptions or not. How we decide
2 that, I think, fairly exotic question of law is beside the
3 point. The question here is, are the exemptions met? And if
4 the government hasn't done that, whatever we think about secret
5 law is beside the point. Our view is they have not shown
6 either that the legal analysis contained in this document is
7 exemption 1 under the executive order or exemption 3 under the
8 National Security Act.

9 Thank you, your Honor.

10 THE COURT: All right. Counsel, I want to thank you
11 for your thoughtful arguments and your very well drafted briefs
12 in this matter. There are some exotic questions embedded in
13 this matter, so decision reserved.

14 Have a good weekend.

15 MR. McCRAW: Thank you, your Honor.

16 * * *